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Attorneys for Defendant
Goldwater Bank, N.A.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA**

MARK AUSSIEKER, individually and on
behalf of all others similarly situated,

Plaintiffs,

vs.

GOLDWATER BANK, N.A., Does 1-10
inclusive

Defendant.

Case No. 2:22-CV-00851-MCE-DB

**JOINT STATUS REPORT UPON THE
NINTH CIRCUIT'S DECISION IN *TRIM V.
REWARD ZONE USA LLC*, No. 22-55517
(FORMERLY *EGGLESTON V. REWARD
ZONE USA, LLC*, No. 2:20-CV-01027-
SVW-KS (C.D. CAL. JAN. 28, 2022))**

COMES NOW Plaintiff Mark Aussieker, purported class representative, and
Defendant Goldwater Bank, N.A., by and through their respective counsel of record, with

1 their Joint Status Report upon the resolution of the Ninth Circuit appeal of *Eggleston v.*
2 *Reward Zone USA, LLC*, No. 2:20-CV-01027-SVW-KS (C.D. Cal. Jan. 28, 2022), as
3 ordered by the Court. The parties previously sought and received a stay of this action
4 pending the resolution of the *Eggleston* appeal, the outcome of which the parties attested
5 would impact the claims and defenses at issue in this matter. *See* ECF No. 17, 19. The
6 Court ordered the parties to file this Joint Status Report within 14 days after a ruling in
7 *Eggleston*, an event that occurred on August 8, 2023, with the issuance of two opinions, one
8 published and one unpublished, in the re-styled matter of *Lucine Trim v. Reward Zone USA*
9 *LLC*, et al., Case No. 22-55517 (9th Cir. Aug. 8, 2023). Plaintiff's counsel, who are also
10 counsel of record in *Eggleston/Trim*, intend to seek *en banc* review in *Trim*, and/or seek a
11 Writ with the Supreme Court. Defendants believe the Ninth Circuit decisions in
12 *Eggleston/Trim* are dispositive to this case as detailed below.

16 I. INSTANT PROCEDURAL HISTORY.

17 Plaintiff filed this putative class action on May 19, 2022, and amended his pleading
18 on June 20, 2022. *See, e.g.*, ECF Nos. 1 and 4. Plaintiff's Amended Complaint broadly
19 alleges Goldwater violated the *Telephone Consumer Protection Act*, 47 U.S.C. § 227, *et*
20 *seq.* ("TCPA"), specifically 47 U.S.C. §227(b)(1)(A), which prohibits unsolicited calls
21 made with an "automatic telephone dialing system" or ATDS, also commonly referenced
22 as an "autodialer," and calls using an "artificial or prerecorded voice." *See, generally*, ECF
23 No. 4; *but see* ECF No. 18, Pltfs. Oppo to MtD at p.2 ("Plaintiff's Allegations").

26 On August 8, 2022, Goldwater filed its Motion to Dismiss Plaintiff's Amended
27 Complaint, noting that Plaintiff's allegations failed to allege any communications made
28

1 with an ATDS or using an “artificial or prerecorded voice” sufficient to state a claim under
2 the TCPA. *See* ECF No. 13, Def. MtD. Goldwater’s Motion to Dismiss placed particular
3 emphasis on the Central District of California’s ruling in *Eggleston v. Reward Zone USA,*
4 *LLC*, No. 2:20-CV-01027-SVW-KS, 2022 WL 886094, at *4 (C.D. Cal. Jan. 28, 2022)
5 (“*Eggleston*”), which dismissed, with prejudice, claims based on substantively identical
6 allegations of TCPA violations.
7

8 Prior to Plaintiff’s Response in Opposition to Goldwater’s Motion to Dismiss (ECF
9 No. 18); the parties filed a Stipulation of Stay, asking this Court to stay this matter until the
10 conclusion of the Ninth Circuit’s impending review of *Eggleston*. On August 24, 2023, this
11 Court stayed this action pending the outcome of the *Eggleston* (now *Trim*) appeal. ECF No.
12 19. The Court Ordered the parties to file a joint status report no later than fourteen (14) days
13 after the issuance of an appellate ruling, “addressing the impact of the decision on the
14 litigation of this case.” ECF No. 19. The Court’s Order further denied Goldwater’s Motion
15 to Dismiss, without prejudice to its renewal once the stay was lifted.
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18 On August 8, 2023, the Ninth Circuit issued a published opinion, *Trim v. Reward*
19 *Zone USA LLC*, No. 22-55517, --- F.4th ----, 2023 WL 5025264 (9th Cir. Aug. 8, 2023);
20 and an unpublished Memorandum Opinion, *Trim v. Reward Zone USA LLC*, No. 22-55517,
21 2023 WL 5043724, at *1 (9th Cir. Aug. 8, 2023); directly addressing the TCPA issues raised
22 by the parties the instant case.¹ The parties now address these rulings and their impact.
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27 ¹ The Circuit’s Opinions as published on the Ninth Circuit’s ECF docket are attached hereto
28 at **Exhibits 1** and **2** for the Court’s convenience.

II. THE NINTH CIRCUIT’S RULINGS IN *EGGLESTON/TRIM*.

As indicated above, *Eggleston* was re-styled at the Circuit as *Lucine Trim v. Reward Zone USA LLC*, et al., case no. 22-55517 (“*Trim*”) due to a change in class representative. See *Trim v. Reward Zone USA LLC*, No. 22-55517, --- F.4th ----2023 WL 5025264, at *2 (9th Cir. Aug. 8, 2023). At issue in *Trim* was the District Court’s dismissal of two of the plaintiff’s causes of action. “In Trim’s first cause of action, she alleged that the text messages were sent using an ATDS and thus violated the TCPA.” *Id.* at *1. “In her second cause of action, she alleged that the text messages constituted ‘prerecorded voice messages’ and, therefore, also violated the TCPA on that ground.” *Id.*

The published decision in *Trim* rejected Trim’s second cause of action, also advanced by Plaintiff in this action, that a text message can constitute a prohibited call using an “artificial or prerecorded **voice**” as contemplated by 47 U.S.C. § 227 (b)(1)(A). See ECF No. 4, Amd. Compl. at pp. 5-6, ¶¶ 24-26. In its accompanying, unpublished Memorandum Opinion, the Circuit Court further addressed Trim’s first cause of action, holding that any claim was foreclosed by the Circuit’s decision in *Borden v. eFinancial, LLC*, 53 F.4th 1230 (9th Cir. 2022), which held that:

a system constitutes an autodialer regulated by the TCPA only if it “generate[s] and dial[s] random or sequential telephone numbers.” *Id.* at 1231 (emphasis removed). Because Trim concedes that the subject dialing equipment did not generate telephone numbers using a random or sequential number generator, Reward Zone’s text messages were not sent via use of an autodialer in violation of the TCPA.

In applying *Borden*, the *Trim* Panel also rejected, as moot, Trim’s request for *en banc* review of her case and through it, the panel decision in *Borden. Trim*, 2023 WL 5043724, at at n.1.

III. DEFENDANT GOLDWATER'S POSITION.

The Ninth Circuit's rulings in *Trim* are dispositive in this case. As in *Trim*, Plaintiff's claims rest on allegations of TCPA violations under 47 U.S.C. § 227(b)(1)(A). See ECF No. 18, Pltfs. Oppo. to MtD at p. 6; see also ECF No. 4, Amd. Compl. at pp. 4-7, ¶¶ 14-31. To avoid dismissal of such claims, Plaintiff must allege facts, taken as true, indicating: (i) Goldwater's use of "an artificial or prerecorded voice" or (ii) Goldwater's use of an "automatic telephone dialing system" (interchangeably referenced as an "ATDS" and "autodialer"). See 47 U.S.C § 227(b)(1)(A). Plaintiff can do neither.

The *Trim* Court's published opinion categorically rejected any argument that a text message, absent any audio component, could constitute a "an artificial or prerecorded voice." Compare *Trim*, --- F.4th ---- 2023 WL 5025264 at *3-5, with ECF No. 4 Amd. Compl. at pp. 5-6, ¶¶ 24-26. Plaintiff's Complaint offers nothing to indicate the message at issue was anything other than text only, even providing the message verbatim:

GW Bank offers FHA/VA/Conv & Jumbo Construction & Renovation for your clients up to \$1M! Text Greg @ 415.205.8858 for information. Site: <https://t.ly/DRzs> Reply STOP to Opt-Out

ECF No. 4 Amd. Compl. at pp. 4-5, ¶ 18. Plaintiff does not (and cannot) allege an audio component; therefore, pursuant to *Trim*, he cannot sustain his claim under 47 U.S.C § 227(b)(1)(A) on this ground.

Plaintiff similarly does not allege the use of a "number generator" in this lawsuit. See ECF No. 4, Amd. Compl. ¶¶ 14-31. In an effort to establish a prohibited ATDS so as to fall within the other half of 47 U.S.C § 227(b)(1)(A), Plaintiff alleges only that Goldwater sent a single text message using what he describes as an "SMS blasting platform" that was

1 “programmed by an operator.” See ECF No. 4, Amd. Compl. ¶¶ 17-23. Plaintiff’s omission
2 of allegations regarding a random or sequential number **generator**, standing alone, renders
3 Plaintiff’s ATDS allegations insufficient. See *Eggleston*, 2022 WL 886094, at *3, *aff’d by*
4 *Trim*, 2023 WL 5043724, at *1 (holding a system constitutes an ATDS “only if it
5 ‘generate[s] and dial[s] random or sequential telephone numbers’”) (quoting *Borden v.*
6 *eFinancial, LLC*, 53 F.4th 1230 (9th Cir. 2022) (brackets in original)).

7
8 In fact, the “SMS blasting platform” Plaintiff’s Amended Complaint describes
9 plainly does **not** use a number generator to generate the phone numbers, as demonstrated
10 by the text message Plaintiff alleges he received, a text-only message directly targeted at
11 real estate professionals like Plaintiff. See ECF No. 4, Am. Compl. ¶ 18 (text message);
12 *Gross v. GG Homes, Inc.*, No. 3:21-CV-00271-DMS-BGS, 2021 WL 4804464, at *3 (S.D.
13 Cal. Oct. 14, 2021) (content of text message indicated targeting that rendered implausible
14 conclusory allegations of ATDS). This was not a message “blasted” to a random or
15 sequentially generated series of numbers as *Trim* requires; thus, Plaintiff **cannot** allege the
16 use of an ATDS and his claims resting on the same must be dismissed with prejudice.

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18 The *Trim* Court expressly rejected, as a matter of law, both bases upon which the
19 instant Plaintiff’s claims under 47 U.S.C. § 277(b)(1)(A) could possibly rest, holding that
20 (1) a text message without audio is not an “artificial or prerecorded voice” and that (2) a
21 system is only a prohibited ATDS/autodialer if it **generates** random or sequential telephone
22 numbers. Considering the *Trim* Court’s clear rejection of arguments almost identical to
23 those advanced by Plaintiff here, flaws that cannot be cured by amendment, Goldwater
24 hereby renews and reurges its Motion to Dismiss (ECF No. 13), asking that this Court
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1 dismiss Plaintiff's claims with prejudice as did the District Court in *Eggleston* and as was
2 ultimately affirmed by the Ninth Circuit in *Trim*.

3 Defendant objects to any continuation of the stay in this case. *Trim* reiterated the
4 holding in *Borden* that to qualify as an ATDS, the system must ***generate and dial random***
5 ***and sequential numbers***. After multiple cases, that is the settled law in this Circuit to which
6 this Court is bound. *See U.S. v. Wright*, 46 F.4th 938, 946 (9th Cir. 2022). As demonstrated
7 above, Goldwater's system, as alleged, does not generate random and sequential numbers
8 and is not an ATDS. Moreover, Plaintiff cannot hope to meet the standard for imposing a
9 stay here to avoid this result in the face of binding Ninth Circuit precedent. To secure a stay
10 Plaintiff must show: (1) a reasonable probability that four Justices will consider the issue
11 sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court
12 will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will
13 result from the denial of a stay. *Hollingsworth v. Perry*, 558 U.S. 183, 190, 130 S. Ct. 705,
14 709, 175 L. Ed. 2d 657 (2010).

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18 Counsel's initial request for *en banc* review in *Trim* was already mooted by the
19 panel's decision; *Trim*, 2023 WL 5043724, at n.1; and the Supreme Court is unlikely to
20 again hear the ATDS issue just two years after issuing *Facebook, Inc. v. Duguid*, a case
21 extensively briefed by the parties herein and in *Borden* and *Trim*. *See, e.g., Borden*, 53 F.4th
22 at 1235; *see also Facebook, Inc. v. Duguid*, 141 S. Ct. 1163, 1171, 209 L. Ed. 2d 272 (2021)
23 ("Expanding the definition of an autodialer to encompass any equipment that merely stores
24 and dials telephone numbers would take a chainsaw to these nuanced problems when
25 Congress meant to use a scalpel"). Accordingly, Goldwater respectfully asks that the Court
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1 rule on its Motion to Dismiss [ECF No. 13] and dismiss Plaintiff's lawsuit with prejudice
2 consistent with *Borden* and *Trim*.

3 **IV. PLAINTIFF AUSSIEKER'S POSITION**

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5 The *Trim* decision impacts this case, Plaintiff does not deny that. However, the
6 decision was reached erroneously as it precludes liability for dialing platforms that use
7 random or sequential number generators to store or produce telephone numbers to be called
8 by the dialer, which is exactly how Defendant's system operates. Plaintiff's counsel have
9 reviewed source code of such systems with software engineers, and briefed this issue
10 extensively in *Trim*. Unfortunately, the *Borden* decision was entered before the Ninth
11 Circuit was able to review the factual issues presented in *Trim*, and so, bound by law of the
12 circuit, they had no choice but to follow the prior Order, even though it was obviously
13 erroneous in light of the facts and arguments raised by the *Trim* appeal. Accordingly, for
14 there to actually be a review of the question of whether such systems qualify as an ATDS,
15 *en banc* or Supreme Court Review is necessary. Trim plans to seek both. Until that issue
16 is ultimately decided, this case remains unripe, and the stay should remain in place.
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20 Dated: August 22, 2023

21
22 **WAGNER HICKS PLLC**

By: /s/ Sean C. Wagner

23 Sean C. Wagner, Esq.

24 Abbey M. Krysak, Esq.

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N.A.*

AND

LAW OFFICES OF TODD FRIEDMAN, P.C.

By: /s/ Todd M. Friedman
Todd M. Friedman, Esq.

ATTORNEY FOR PLAINTIFF

SIGNATURE CERTIFICATION

Pursuant to Section 2(f)(4) of the Electronic Case Filing Administrative Policies and Procedures Manual, I hereby certify that the content of this document is acceptable to counsel for Defendant and that I have obtained counsel's authorization to affix counsel's electronic signature to this document.

Dated: August 22, 2023

WAGNER HICKS PLLC

By: /s/ Sean C. Wagner
Sean C. Wagner, Esq.
Abbey M. Krysak, Esq.
Meagan L. Allen, Esq.

CERTIFICATE OF SERVICE

Filed electronically on this 22nd Day of August 2023, with the United States District Court for the Eastern District of California's CM/ECF system.

Notification sent electronically on this 23rd Day of August, 2023, to:

Honorable Morrison C. England
United States District Court
Eastern District of California

and

All Counsel of Record as Recorded on the Electronic Service List

/s/ Sean C. Wagner
Sean C. Wagner, Esq.